84-1198

No.

Office-Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GAF CORPORATION,

Petitioner,

vs.

JAMES K. J. CHENG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RONALD MICHAEL GREEN
ROBERT LLOYD JAUVTIS
Attorneys for Petitioner
250 Park Avenue
New York, New York 10177
(212) 370-9800

Of Counsel:
EPSTEIN BECKER BORSODY
& GREEN, P.C.
250 Park Avenue
New York, New York 10177
(212) 370-9800

January, 1985

QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit erred in holding that an entire multi-city, multi-department law firm should be disqualified prior to trial from defending a client in an action[1] because one of its attorneys previously worked for a legal services organization which represents the plaintiff in that action, where the law firm began defending the action substantially prior to hiring the attorney, where that attorney had no direct involvement with the action or the plaintiff while at the legal services organization, where the attorney has been completely screened away from any involvement in the action while at the law firm and assigned to a department of the firm wholly removed and distinct from the department in charge of defending the action, where the attorney has revealed no alleged confidences and his integrity has been deemed above suspicion, and where the District Court twice had found that continued representation of defendant would not in fact be prejudicial to plaintiff and declined to disqualify the law firm, but where the District Court ultimately reversed itself only under judicial duress caused by prior Second Circuit *dicta* in the action after years of proceedings that did not produce any evidence of prejudice.

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[1] The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeals for the Second Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GAF CORPORATION,

Petitioner,

VS.

JAMES K. J. CHENG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner GAF Corporation ("GAF")[2] prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on October 25, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 747 F.2d 97 (2d Cir. 1984) and is set forth at Appendix A herein. The opinion of the District Court for the Southern District of New York, dated February 13, 1984, is not reported and is set forth at Appendix B herein.

[2] GAF has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on October 25, 1984. This petition for a writ of certiorari was filed within ninety (90) days of the entry of judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CODE OF PROFESSIONAL RESPONSIBILITY PROVISIONS INVOLVED

Canon 4 of the Code of Professional Responsibility ("Code") states: "A Lawyer Should Preserve the Confidences and Secrets of a Client."

Canon 5 of the Code states: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."

Canon 9 of the Code states: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

Disciplinary Rule 5-105(D) of the Code states: "If a lawyer is required to decline employment or withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

STATEMENT OF THE CASE

From October 1974 until October 1979, Philip M. Gassel ("Gassel") was employed as a staff attorney by Legal Services for the Elderly Poor[3] ("LSEP"). LSEP was at all relevant times a state and federally funded legal services organization specializing in legal problems of the elderly. During the period of Gassel's employment, LSEP employed from four to six attorneys, assisted by several part-time law students.

On June 29, 1977, James K.J. Cheng ("Cheng"), respondent herein, commenced this action, invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1343, and alleged that GAF violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et. seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Cheng was represented by Jonathan A. Weiss, Director

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[3] The name of the entity was changed to Legal Services for the Elderly after Gassel's departure.

of LSEP. While at LSEP, as Cheng's counsel has contended herein, Gassel was present at certain "informal" staff discussions with various attorneys regarding, among other things, the general course and status of any number of LSEP cases of which Cheng's case was one, and may have been exposed more than five years ago to unspecified confidential information. However, as conceded by Cheng's counsel, at no time did Gassel represent Cheng in any capacity. He undertook no research, neither reviewed nor prepared pleadings, motion papers, memoranda or correspondence of any kind, nor did Gassel ever confer with Cheng with regard to the prosecution of this case.

The firm of Epstein Becker Borsody & Green (the "Epstein Firm") hired Gassel as an associate in October 1979 for its health law department because of his expertise in that substantive area. At that time, this action had been pending over two years and was being defended by the Epstein Firm's labor law department. The defense of the case was originally undertaken by Ronald Michael Green, then a member of another law firm, who, upon joining the Epstein Firm in August 1978, continued supervising GAF's defense as head of the Epstein Firm's labor law department. This case, as it is an employment discrimination matter, was initially assigned to the Epstein Firm's labor law department, which has handled it exclusively to this date with no assistance from any of its other departments. When Gassel was first employed, the Epstein Firm had some thirty-five attorneys, with New York City and Washington, D.C. offices.[4] At all relevant times, the Epstein Firm has had only three major areas of specialization, labor law, health law and government procurement law. Attorneys are permanently assigned to one of these areas of specialization on a full-time and exclusive basis due to the high degree of substantive expertise necessary to adequately represent clients in those areas. Staff meetings are held separately for each specialty. Gassel was assigned to

[4] The Epstein Firm has since grown to well over one hundred attorneys, and added offices in Forth Worth, San Francisco, Los Angeles, Tallahassee, and Alexandria. It has been ranked as one of the 250 largest law firms in the country.

the health law department at the commencement of his employment with the Epstein Firm and has remained continuously with that department.

Since the inception of Gassel's employment, the Epstein Firm has maintained a "Chinese Wall" between him and this case, which has never been breached. Gassel has had no involvement with this case whatsoever, other than filing factual affidavits with the District Court solely with regard to Cheng's disqualification motions, and has not been privy to any discussions regarding the merits, defenses, tactics or strategies of the case. He has never been permitted to work on the case or view the files. Attorneys in the Epstein Firm may not discuss the case with Gassel or in his presence. Gassel has divulged no confidential information to the Epstein Firm, has never been requested to do so, nor would he do so. Cheng and his counsel have considered Gassel's integrity above suspicion.[5]

On January 25, 1980, Cheng moved to disqualify the entire Epstein Firm on the grounds that its continued participation in the action violated the Code of Professional Responsibility. On March 14, 1980, the District Court for the Southern District of New York denied the motion, concluding after extensive factual submissions and argument that under the circumstances presented, disqualification "would not serve any interest which the law recognizes." At the time the motion was decided, substantial discovery over a period of approximately two years, including numerous depositions, interrogatories and document requests, as well as extensive legal research and other pre-trial preparation, had been completed and GAF had already incurred the attendant and considerable legal expenses. Cheng appealed the order denying disqualification.

On August 26, 1980, the Court of Appeals for the Second Circuit reversed the decision of the District Court, finding that, despite the Epstein Firm's substantial and uncontroverted screening procedures, it was "unclear to us how disclosures, admittedly inadvertent, can be prevented throughout the course

[5] Gassel became a member of the Epstein Firm on July 1, 1984. He will not be permitted to share in any revenues generated by this action.

of this representation." *Cheng v. GAF Corp.*, 631 F.2d 1052, 1058 (2d Cir. 1980). The case was remanded to the District Court for entry of an order of disqualification. GAF, after unsuccessfully petitioning for rehearing, then filed a petition for a writ of certiorari with this Court.

By order dated February 23, 1981, the Court granted certiorari and summarily vacated the judgment of the Court of Appeals for the Second Circuit with instructions that Cheng's appeal be dismissed (for want of jurisdiction) pursuant to *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), on the ground that an interlocutory appeal of the order denying disqualification was not available. *GAF Corp. v. Cheng*, 450 U.S. 903 (1981). Thereafter, Cheng moved before the Second Circuit to have his appeal deemed a petition for a writ of mandamus. The motion was denied.

On May 12, 1981, Cheng moved to renew his original disqualification motion although there were absolutely no new supporting facts presented to the District Court. The court denied the motion on July 1, 1981 without prejudice to its later renewal should it appear that "permitting continuing representation was [in fact] prejudicial" to Cheng. Then Cheng petitioned the Second Circuit for a writ of mandamus, which was denied. Thereafter, Cheng filed a petition for a writ of certiorari with this Court. That petition was denied on January 18, 1982. *Cheng v. GAF Corp.*, 455 U.S. 909 (1982).

Arguing that Cheng's disqualification efforts subsequent to his first such motion were unreasonable and vexatious, GAF moved in the District Court to recover attorneys' fees and costs under 28 U.S.C. § 1927. The motion was granted to the extent that GAF was awarded $1,000 in expenses. *Cheng v. GAF Corp.*, 566 F. Supp. 350 (S.D.N.Y. 1982). Cheng appealed to the Second Circuit, which reversed, finding it "puzzling" that the District Court did not grant the second disqualification motion. *Cheng v. GAF Corp.*, 713 F.2d 886, 891 (2d Cir. 1983).

On September 2, 1983, armed with the Second Circuit's "message" to the District Court, Cheng moved for the third time

to disqualify the Epstein Firm. This time the District Court granted the motion, stating in its brief February 13, 1984 opinion:

> While aware that the Court of Appeals denied the mandamus plaintiff sought following the denial of the prior motion; and aware of the instruction of *Firestone v. Risjord*, 449 U.S. 368 cited by the Supreme Court on the first certiorari herein, at 377: "The propriety of the District Court's denial of a disqualification motion will often be difficult to assess until after its impact on the underlying litigation may be evaluated, which is normally after final judgment..."; and aware of today's great and increasing amount of lateral transfers of lawyers among firms (*see, e.g.*, *"The Rush to Lateral Hires,"* The National Law Journal, October 31, 1983); and while aware of plaintiff's counsel's concession on the record on the argument of the motion that he knows of no actual prejudice from Mr. Gassel's transfer, and that his claim is that, "The actual injury was created by the transfer[,]" the motion is nevertheless granted, *see*, 713 F.2d 886 (1983). This action should proceed to its conclusion unburdened of this overhanging issue.

A-5.[6]

GAF appealed the District Court decision. By decision dated October 25, 1984, the Second Circuit affirmed, finding no abuse of discretion. (A-1). To date, some five years have been consumed by Cheng's disqualification efforts, and the Epstein Firm has incurred substantial nonrecoverable expenses.

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[6] Refers to page number of Appendix.

REASONS FOR GRANTING THE WRIT

I.

This Case Presents Issues of Importance to the Entire Legal Profession.

All lawyers function in a system filled with ethical constraints, many of which are hard to apply and capable of generating significant debate. The courts are frequently placed in the difficult position of having to interpret these ethical constraints. The resulting rulings affect both attorneys and their clients. The issues presented in this case have particularly far-reaching impact on the mobility of attorneys, especially those who wish to devote, or who have devoted, any portion of their time or careers to the public interest, and the ability of litigants to freely choose their counsel.

The question of whether a law firm must be disqualified from a case in which it has a substantial and long-standing commitment because of the necessity for disqualification of a former legal services attorney now employed by the firm, who has been effectively screened from the case, is closely akin to the same question involving a government attorney. The former government attorney issue has attracted a great deal of attention. In *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (*en banc*), *vacated on jurisdictional grounds*, 449 U.S. 1106 (1981), the Court of Appeals for the Second Circuit addressed the issue of screening procedures as a method of avoiding law firm disqualification. On the rehearing *en banc* of the Second Circuit's earlier panel decision, 606 F.2d 28 (2d Cir. 1979), the court received seven *amici curiae* briefs, all attesting to the importance of the issues raised on appeal, and stated that a decision rejecting the efficacy of screening "may have significant adverse consequences." 625 F.2d at 443. These consequences, in the words of the court, could take the following forms:

> Thus, such disapproval may hamper the government's efforts to hire qualified attorneys; the latter may fear that government service will transform them into legal 'Typhoid Marys,' [footnote omitted] shunned by prospective employers because hiring them may

> result in the disqualification of an entire firm in a possibly wide range of cases.

Id. at 443. *See also Central Milk Producers Cooperative v. Sentry Food Stores, Inc.*, 573 F.2d 988, 991 (8th Cir. 1978); *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) (per curiam); Comment, *Disqualification of Counsel: Adverse Interests and Revolving Doors*, 81 Colum. L. Rev. 199 (1981); Comment, *The Future of the Chinese Wall Defense to Vicarious Disqualification of a Former Government Attorney's Law Firm*, 38 Wash. & Lee L. Rev. 151 (1981).

The legal services bar, like that of government service, is a significant sector of the legal profession, involving thousands of attorneys. For example, the Legal Services Corporation, established by Congress in 1974, funded programs (such as LSEP) staffed with nearly five thousand attorneys as of the end of the fiscal year 1983. For fiscal year 1984, the Legal Services Corporation operated with a budget of over two hundred eighty million dollars. Legal Services Corporation 1984 Fact Book, at 1-2. Every state and virtually every city has a public interest law organization or bar association actively involved in *pro bono* work. The number of attorneys in the private practice of law who may from time to time volunteer their services to the public interest is impossible to calculate but is clearly substantial.

Legal services attorneys frequently follow a career path like that of government attorneys, often going into private practice after a period of public service to the disadvantaged. While in public service, legal services attorneys, like their counterparts in government service, often develop expertise in particular areas of law. Furthermore, like government attorneys, legal services attorneys frequently work on broad, "issue oriented" matters, which have significance to numerous parties, affect the administration of various statutory schemes, and have broad impact on segments of the economy. So too, private law firms, many times responding to the call of local bar associations, volunteer their attorneys for *pro bono* work under the auspices

of legal services organizations.[7] New associates with law firms commonly request such license when beginning their employment.

The consequences which would flow from disqualifications of government attorneys are the same with regard to legal services attorneys. Lawyers, law firms and clients, when faced with uncertainty as to the efficacy of screening, will seek to avoid the risk by disassociating themselves from those who create the risk. Lawyers or law firms with numerous clients and ongoing matters will surely be reluctant to do *pro bono* work for legal services organizations when, if the Second Circuit's rigid disqualification test set out in this case is used, disqualification of entire law firms could result from the mere employment of attorneys who previously worked for public interest agencies maintaining positions in matters adverse to the firms' clients despite all best efforts to insulate the affected attorneys from the matters at issue. Such circumstances will have a significant effect on legal services organizations, on clients who may be separated from counsel of their choice, and on the mobility of untold thousands of attorneys and law students choosing how and where to begin their legal careers.[8]

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[7] Indeed, in this case, Cheng's brief to the Court of Appeals for the Second Circuit regarding the denial of his first disqualification motion was written with the assistance of an attorney then on leave from a large, prestigious New York City law firm to work with LSEP for several months.

[8] The issue of screening affects, of course, the ever increasing number of attorneys going from one law firm to another. Much interest in this problem has evolved within the legal profession. *See, e.g.*, Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 Am. B. Found. Research J. 419; Peterson, *Rebuttable Presumptions and Intra-Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel*, 59 Notre Dame L. Rev. 399 (1984); Adler, *Beyond Chinese Walls: Coping with Conflicts*, The American Lawyer, May 1984, at 6, col. 1.

II.

The Decision of the Court of Appeals Deviates from the Considerations Expressed by This Court in *Firestone Tire & Rubber Co. v. Risjord.*

In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), this Court held that a district court's order denying a motion to disqualify counsel was not appealable prior to final judgment. The underpinning of the *Firestone* decision was that, contrary to the petitioner's assertions therein that denying it immediate review would cause it irreparable harm, the petitioner failed to supply a "single concrete example" of the indelible stamp or taint of which it warned. *Id.* at 376. *Firestone* noted that "[t]he propriety of the district court's denial will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is *normally only after final judgment.*" *Id.* at 377 (emphasis added).

The Court of Appeals for the Second Circuit improperly granted disqualification of the Epstein Firm in advance of trial notwithstanding the District Court's unchallenged finding of fact that respondent Cheng's counsel conceded that he knew of no actual prejudice resulting from Gassel's change of employment. While the *Firestone* decision spoke to the issue of appealability, the viewpoint was expressed that the courts should focus on the existence of actual, not speculative, injury or prejudice in attorney disqualification matters. *See* 449 U.S. at 378-79 n. 13. Yet, the Court of Appeals, relying heavily on its own pre-*Firestone* opinion in this case, 631 F.2d 1052 (2d Cir. 1980), has steadfastly refused to accept the teachings of this Court and continues to stress only the possibility of inadvertent disclosure of information. This position, reiterated in the Second Circuit's decision reversing the award of expenses to the Epstein Firm, 713 F.2d 886 (2d Cir. 1983), unduly influenced the District Court to reverse its prior decisions and reluctantly order disqualification.

III.

The Decision of the Court of Appeals Ignores Less Drastic Alternatives to Vicarious Disqualification.

The Epstein Firm argued to the Court of Appeals that it would consent to a detailed court order, with provisions for monitoring and sanctions, which would preserve the ethical standards of the profession and the public's perception thereof, and at the same time avoid the hardship of separating GAF from counsel of its choice. Such an order was entered in *NFC, Inc. v. General Nutrition, Inc.*, 562 F. Supp. 332 (D. Mass. 1983). In *NFC*, the court believed that the order would actually serve to enhance the public's confidence in the manner in which the legal profession attends to its ethical codes.

The Court of Appeals has manifestly ignored the rationale of *NFC* and appears to have rejected the principle consistently articulated by the Seventh Circuit to the effect that disqualification is a drastic measure which courts should "hesitate to impose except when absolutely necessary." *See Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982). *See also Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1577 (Fed. Cir. 1984).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

RONALD MICHAEL GREEN
ROBERT LLOYD JAUVTIS
250 Park Avenue
New York, New York 10177
(212) 370-9800

Attorneys for Petitioner

Of Counsel:

EPSTEIN BECKER BORSODY & GREEN, P.C.
250 Park Avenue
New York, New York 10177
(212) 370-9800

January, 1985

APPENDIX

APPENDIX A
Opinion of the Court of Appeals
for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 16 — August Term, 1984

(Argued: September 21, 1984 Decided: October 25, 1984)

Docket No. 84-7246

JAMES K. J. CHENG,

Plaintiff-Appellee,

—against—

GAF CORPORATION,

Defendant-Appellant.

Before:

OAKES, WINTER, and PRATT, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Owen, *J.*, granting plaintiff's motion to disqualify defendant's counsel.

Affirmed.

STUART M. GERSON, New York, NY (Epstein, Becker, Borsody & Green, New York, NY, of counsel), *for Defendant-Appellant.*

JONATHAN A. WEISS, New York, NY (Legal Services for the Elderly Poor, New York, NY, of counsel), *for Plaintiff-Appellee.*

Per Curiam:

Defendant GAF appeals from an order of the United States District Court for the Southern District of New York, Owen, *Judge*, granting plaintiff Cheng's motion to disqualify GAF's counsel, Epstein, Becker, Borsody & Green, P.C. (the Epstein firm). We affirm.

Cheng began this employment discrimination suit against GAF in 1977. While the case was in the discovery stage, the Epstein firm hired as an associate, Philip Gassel, an attorney who had been employed by Legal Services for the Elderly Poor, the organization representing Cheng. Thereupon Cheng moved to disqualify the Epstein firm from representing GAF, contending that the firm's continued participation in the action violated the ABA Code of Professional Responsibility.

Concluding that disqualification "would not serve any interest which the law recognizes" the district court denied this motion. On appeal we reviewed the circumstances and contentions in considerable detail and concluded:

> Thus, it is clear that under Canon 9 as well as Canons 4 and 5, Gassel and the Epstein firm must be disqualified. Judge Owen's decision to the contrary was an abuse of discretion. Moreover, if there were any doubt as to the propriety of our action, we would resolve it in favor of disqualification.

Cheng v. *GAF Corp.*, 631 F.2d 1052, 1059 (2d Cir. 1980) (Cheng I).

We therefore reversed and remanded to the district court for entry of an order of disqualification. *Id.* The Supreme Court summarily vacated our judgment, *GAF Corp.* v. *Cheng*, 450 U.S. 903 (1981), and instructed us to dismiss Cheng's appeal on jurisdictional grounds, based on its intervening decision in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), which held that orders denying motions to disqualify counsel in civil cases are unappealable interlocutory orders. Cheng then moved before us to treat the original appeal as a petition for a writ of mandamus. We denied this motion and dismissed the appeal. *Cheng* v. *GAF Corp.*, 659 F.2d 1058 (2d Cir. 1981) (mem.)

When Cheng later renewed his disqualification motion, the district court denied it without prejudice to still later renewal should circumstances warrant it. After the Supreme Court denied Cheng's petition to review our denial of his request for mandamus, GAF moved in the district court for attorney's fees, expenses, and costs incurred in defending against Cheng's efforts to disqualify GAF's counsel after May 12, 1981, the date on which Cheng had renewed his original disqualification motion in the district court. Finding that Cheng's later disqualification efforts were unreasonable, the district court, pursuant to 28 U.S.C. § 1927, awarded GAF $1,000 in attorney's fees, expenses, and costs. *Cheng* v. *GAF Corp.*, 566 F. Supp. 350 (S.D.N.Y. 1982).

Again we reversed, *Cheng* v. *GAF Corp.*, 713 F.2d 886 (2d Cir. 1983) (Cheng II), concluding that our prior

decision "was itself enough to justify appellant's efforts." *Id.* at 891. In that opinion we observed that:

> Thus, although the district court was not bound by our previous decision, we find it puzzling that he chose to ignore the reasoning of that decision and again denied appellant's motion to disqualify. More significantly, we find it extraordinary that he should penalize appellant's lawyer for attempting to have this court review that denial, given that this court had already ruled in appellant's favor in its earlier opinion.

Id.

Thereafter, Cheng moved for a third time to disqualify the Epstein firm, and this time the district court granted the motion. GAF now appeals, contending that the district court abused its discretion. In light of the prior history of this case, particularly our decisions in *Cheng I* and *Cheng II*, which criticized the district court's view that the Epstein firm should not be disqualified, it is clear that the district court did not abuse its discretion by finally granting the disqualification motion. The order appealed from is therefore affirmed.

APPENDIX B

Opinion of the District Court for the Southern District of New York

MEMORANDUM

Cheng v. GAF, 77 Civ. 3159 (RO)

While aware that the Court of Appeals denied the mandamus plaintiff sought following the denial of the prior motion; and aware of the instruction of *Firestone v. Risjord*, 449 U.S. 368 cited by the Supreme Court on the first certiorari herein, at 377: "The propriety of the District Court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally after final judgment. . ."; and aware of today's great and increasing amount of lateral transfers of lawyers among firms (*see e.g.*, *"The Rush to Lateral Hires,"* The National Law Journal, October 31, 1983); and while aware of plaintiff's counsel's concession on the record on the argument of the motion that he knows of no actual prejudice from Mr. Gassel's transfer, and that his claim is that, "The actual injury was created by the transfer[,]" the motion is nevertheless granted, *see*, 713 F.2d 886 (1983.) This action should proceed to its conclusion unburdened of this overhanging issue.

So ordered.

2/13/84

/s/ Richard Owen

United States District Judge

APPENDIX C

Judgment of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-five day of October one thousand nine hundred and eighty-four.

Present: HON. JAMES L. OAKES
HON. RALPH K. WINTER
HON. GEORGE PRATT
Circuit Judges,

JAMES K.J. CHENG

Plaintiff-Appellee,

— against —

84-7246

GAF CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith,
Clerk

By: Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS
Filed Oct. 25, 1984
Elaine B. Goldsmith, Clerk Second Circuit

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Office-Supreme Court, U.S.
FILED
FEB 25 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1192 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GAF CORPORATION,

Petitioner,

—against—

JAMES K. J. CHENG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JONATHAN A. WEISS
LEGAL SERVICES FOR THE ELDERLY
132 West 43rd Street, 3rd Fl.
New York, New York 10036
(212) 391-0120

Attorney for Petitioner

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should the Supreme Court disturb a Second Circuit decision affirming a District Court's disqualification of a law firm where the Second Circuit has twice ruled that the firm should be disqualified under the Canons of Ethics because petitioner-defendant's attorneys hired into their firm an attorney previously working with respondent-plaintiff's attorneys while they were representing respondent-plaintiff?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GAF CORPORATION,

Petitioner,

-against-

JAMES K. J. CHENG,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Plaintiff-Respondent, James K.J. Cheng, commenced this lawsuit on June 29, 1977. He was represented by Legal Services for the Elderly Poor and Jonathan Weiss, its Director. Phillip M. Gassel was one of the attorneys in that office who met with Mr. Cheng as an attorney employed in the office representing him and who discussed the case with Jonathan Weiss and received confidential information about the case.

In October 1979, Defendant-Petitioner's attorneys hired Mr. Gassel, who had informed

them of the existence of the Cheng litigation and the involvement of both offices. Immediately upon his hiring, the Plaintiff-Respondent requested that the firm representing Defendant-Petitioner disqualify themselves. Upon their refusal, he filed a motion to disqualify the firm.

The Second Circuit has summarized the crucial facts concerning that motion as follows:

> After learning of Gassel's new association, Cheng filed a motion to disqualify the Epstein firm from representing GAF in the instant case. Cheng alleged that the "continued participation of the Epstein firm...seriously jeopardizes the integrity of confidences and secrets of [Cheng] which were imparted to Mr. Gassel under the cloak of attorney-client relationship." Weiss Affidavit at 5. Citing the small size of the LSEP legal staff, which consisted of four to six attorneys working with several part-time students, and noting the frequency of cooperation and consulation among the LSEP attorneys, Cheng claimed that Gassel had actual knowledge of Cheng's confidences and secrets when he joined the Epstein firm. Cheng argued, therefore, that under Canons 4, 5 and 9

of the ABA Code,* the Epstein firm should be disqualified.

Opposing the disqualification motion, the Epstein firm averred in its affidavits that Gassel had been hired as a health law attorney and had functioned only in that capacity, aside from handling some commercial litigation and miscellaneous matters. The Epstein firm emphasized that Gassel had not worked on the Cheng case, had not divulged any confidential information and would not be required to do so in the future. Gassel submitted an affidavit disclaiming any present involvement in the Cheng case and urging

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* The ABA Code consists of Canons which are "axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers." While the Ethical Considerations accompanying each Canon are "aspirational in character," the Disciplinary Rules keyed to each Canon "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Preliminary Statement, American Bar Association Code of Professional Responsibility.

Canon 4 states: "A Lawyer Should Preserve the Confidences and Secrets of a Client." Canon 5 provides: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client" and Canon 9 warns that: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

> acceptance of the technique of insulation practiced by the Epstein firm.
>
> Cheng v. GAF, 631 F.2d, 1052 (2d Cir. 1981), at 1054 (Cheng I)

This opinion, Cheng I, is rather surprisingly omitted from defendant-plaintiff's papers, as is the second discussion by the Second Circuit of the reasons to disqualify the defendant-plaintiff's firm. Cheng v. GAF Corp., 713 F.2d 886 (2d Cir. 1983) (Cheng II). (We attach them as Appendices A and B.)*

During the course of the litigation, Jonathan Weiss indicated to the court that Mr. Gassel had discussed the case with a member of his new firm (which he denied). His firm was also disqualified in another case on ethical grounds because of Gassel's switching sides.

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* Omission of these opinions violates Rule 21(k)(ii) of the Rules of this Court. These two Court of Appeals decisions strongly undercut defendant-petitioner's legal, ethical and factual claims. Legal Services had to reproduce them, at considerable cost, and we respectfully request that this Court award costs.

Yaretsky v. Blum, 525 F. Supp. 24 (SDNY 1981). (Attached as Appendix C.) These facts were brought to the attention of the District Court in all subsequent proceedings involving this case as further facts necessitating disqualification.

Part of the history of the case was summarized by the Second Circuit in the omitted Cheng II:

> In 1977, appellant Cheng filed an employment discrimination suit against appellee GAF Corp. (GAF). Appellant was represented by Legal Services for the Elderly Poor (LSEP), and appellee was represented by the law firm of Epstein, Becker, Borsody & Green, P.C. (the Epstein firm). In 1979, an LSEP lawyer named Philip Gassel left LSEP and joined the Epstein firm. Cheng then moved to disqualify the Epstein firm from further representing GAF in this case, alleging that Gassel had been privy to confidential information regarding Cheng's suit. The district court denied the motion, but in August 1980, this court reversed on the basis of the Canons of the American Bar Association Code of Professional Responsibility, finding that there existed a danger of taint and at least the appearance of impropriety. Cheng v. GAF Corp., 631

F.2d 1051 (2d Cir. 1980). In February 1981, the Supreme Court vacated this judgment and remanded, 450 U.S. 903, 101 S.Ct. 1338, 67 L.Ed.2d 327 (1981), citing the intervening case of Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981), which held that denials of motions to disqualify may not be reviewed on appeal until after trial except in special circumstances warranting a writ of mandamus. Before the remand reached this court, appellant moved to have this court consider his appeal nunc pro tunc as a request for mandamus; this motion was summarily denied.

In May 1981, appellant moved again for a disqualification order in the district court. When the district court denied this motion, plaintiff sought a writ of mandamus from this court. This petition was denied in September 1981, and plaintiff's subsequent petition for a writ of certiorari was also denied.

GAF then moved in the district court pursuant to 28 U.S.C. 1927 for an award of attorneys' fees and costs incurred in defending against Cheng's most recent efforts to disqualify GAF, beginning with Cheng's May 1981 attempt in the district court to renew his original disqualification motion. The district court...assessed $1,000 in attorney's fees, costs, expenses, against [Cheng's] lawyer.

Cheng II at 888

The Second Circuit reversed that decision

in Cheng II, suggesting that Mr. Cheng had always been correct in insisting on disqualification. Accordingly, he again moved for disqualification on September 2, 1983, which the District Court granted on February 13, 1984. The Second Circuit affirmed the disqualification October 25, 1984.

SUMMARY OF ARGUMENT

There is no reason to disturb the Second Circuit's affirmance of a District Court's order disqualifying a law firm. Three different panels of the Second Circuit have considered the issues presented here, and three times they have indicated that disqualification is appropriate on the facts presented here. Ethical considerations require disqualification of a law firm when an attorney switches sides, and no valid policy reason has been advanced by Defendant-Petitioner to justify avoiding the

strictures of the Canons of Ethics.

REASONS FOR DENYING THE WRIT

Review of this Case is Unwarranted Since the Second Circuit's Affirmance of Disqualifications on Ethical Grounds Should Not Be Disturbed

At the outset it should be noted that this case may not be appealable to the Second Circuit and hence not cognizable by this Court. See Flanagan v. United States, __US__ 104 S.Ct. 1051, 79 L.Ed.2 286 (1984), Firestone Tire & Rubber Co. v. Risjord, supra, for the statement of principles that imply that granting of an attorney disqualification motion is not appealable. But even if this appeal is possible, this Court should recognize that such an appeal is taken from the exercise of discretion by a District Court Judge to the Court of Appeals. This Court should rarely be placed in the business of reviewing a Circuit Court's review of a lower court's abuse of

discretion and therefore that review by this Court requested here should be denied since no extraordinary reason exists to invoke this Court's scrutiny of a lower court's review of a discretionary decision.

Even if this Court were to consider this case an appropriate vehicle to review a review of abuse of discretion in such a complicated factual and procedural setting, it would be embarking on such an undertaking pursuant to Defendant-Petitioner's further request to overrule the clear commands of the Canons of Ethics, based only on their claims of a policy argument (for which no evidence for its invocation was ever presented to the District Court or Second Circuit Court of Appeals).

The Second Circuit Court of Appeals has discussed those ethical commands for this case as follows:

> We have considered the affidavits submitted to the district court and we conclude that there is ample support for

Judge Owen's assumption that Gassel had been privy to Cheng's confidences, thus we find that under Canon 4 he would be disqualified from representing the defendant in the Cheng case...

Although Gassel may not be personally involved in the Cheng defense, he is a member of a relatively small firm. The matter involved in his prior exposure to Cheng while at LSEP is still being actively pursued by attorneys for GAF at the Epstein firm. Despite the Epstein firm's protestations, it is unclear to us how disclosures, admittedly inadvertent, can be prevented throughout the course of this representation. Unlike many disqualification motions that appear before this Court, here there exists a continuing danger that Gassel may unintentionally transmit information he gained through his prior association with Cheng during his day-to-day contact with defense counsel....If after considering all of the precautions taken by the Epstein firm this Court still harbors doubts as to the sufficiency of these preventive measures, then we can hardly expect Cheng or members of the public to consider the attempted quarantine to be impenetrable. Although we do not question Mr. Gassel's integrity or his sincere efforts to disassociate himself from the Cheng case, we are not satisfied that under the facts of this case the screening will be effective, thus we look to Disciplinary Rule 5-105(D) and order the district court to disqualify the Epstein firm....

III. Appearance of Impropriety

Although we rest our holding on the clear direction in Disciplinary Rule 5-105(D), the result is compelled also by Canon 9's warning that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." In Armstrong v. McAlpin, supra, 625 F.2d 433, we cited the restrained approach to disqualification that had been adopted in Board of Education v. Nyquist, supra, 590 F.2d 1241, noting that where there is no danger that the underlying trial will be tainted, appearances of impropriety alone are insufficient to justify disqualification. Judge Owen, in his opinion below, also cited Nyquist's recommendation of restraint and concluded that it was "virtually assured" that the underlying trial in Cheng would not be tainted. We disagree. Such assurances would not seem to be possible in a situation such as this where Gassel is "potentially in a position to use privileged information," Nyquist, 590 F.2d at 1246, which he gained through his prior contact with the Cheng case. It is possible that, despite attempts by the Epstein firm to screen Gassel, the underlying trial could be tainted through GAF's inadvertent use of the unfair advantage it has over Cheng. This case presents, therefore, both the danger of tainting the underlying trial and the unacceptable appearance of impropriety condemned in Canon 9. Cf. Emle Industries, Inc. v. Patentex,

> Inc., supra, 478 F.2d at 565 (where public confidence in Bar would be undermined, "even an appearance of impropriety requires prompt remedial action by the court").
>
> Thus, it is clear that under Canon 9 as well as Canons 4 and 5, Gassel and the Epstein firm must be disqualified. Judge Owen's decision to the contrary was an abuse of discretion. Moreover, if there were any doubt as to the propriety of our action, we would resolve it in favor of disqualification.
>
> Cheng I at 1057-8

And what of that policy argument that there will be an adverse effect "on the mobility of untold thousands of attorneys"? (P. 9, Petitioner's Petition) Law students are taught, as follows:

> The principal argument in favor of permitting a screening-waiver device [in the context of government lawyers switching sides] is expediency based on speculation. Without the support of a single specific illustration, the charge is made that the government will find it impossible to employ competent lawyers if the screening-waiver exception is rejected.
>
> As observed by former American Bar Association president Chesterfield

> Smith, however, that contention is "pure hogwash."
>
> Professional Responsibility Problems and Material, Morgan & Rotunda, Foundation Press (1984) at p. 114

Speculation about career inhibition for lawyers employed by legal services offices with vastly fewer attorneys than the government is *a fortiori* "hogwash." It should be noted that Mr. Gassel is now a partner in Defendant-Petitioner's firm (Petition p. 4) in spite of his firm's disqualification in *two* cases due to the taint of his switching sides. It should be further pointed out that in all the years of lawyers' being employed both in legal services and private practice *only* two reported cases known to respondent deal with disqualification motions: *Cheng* and *Yaretsky*, and *both* deal with this Epstein firm. It should be finally noted that no public interest

organization has joined in support of the Petition or in support of this policy exception claimed to the Canons of Ethics. Even if there exist policy considerations which could lead to suspending the Canons of Ethics, there is no reason to believe that this policy urged now with no sound basis in fact should create such an exception and no reason for this Court to reach out and make it one.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied, and costs awarded to plaintiff-respondent as the bringing of this petition was frivolous.

Respectfully submitted,

Jonathan Weiss

February 1985

APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX A

Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1199—September Term, 1979

(Argued May 19, 1980 Decided August 26, 1980)

Docket No. 80-7254

JAMES K. J. CHENG,

Plaintiff-Appellant,

v.

GAF CORPORATION,

Defendant-Appellee.

Before:

OAKES and MESKILL, *Circuit Judges,*
and BONSAL, *District Judge.**

Appeal from an order entered in the United States District Court for the Southern District of New York, Richard Owen, *Judge,* denying plaintiff's motion to disqualify defendant's law firm.

Reversed and remanded.

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* Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, sitting by designation.

JONATHAN A. WEISS, Legal Services for the Elderly Poor, New York, New York (Kathleen L. Coles, Legal Services for the Elderly Poor, New York, New York, of counsel), *for Plaintiff-Appellant.*

ROBERT L. JAUVTIS, New York, New York (Epstein Becker Borsody & Green, New York, New York, of counsel), *for Defendant-Appellee.*

MESKILL, *Circuit Judge:*

James K. J. Cheng appeals from an order entered in the United States District Court for the Southern District of New York (Owen, *J.*) denying his motion to disqualify the law firm representing his opponent, GAF Corporation. Cheng argued below that because one of the attorneys employed by the law firm representing GAF previously had been employed by the legal services office representing Cheng, disqualification was necessary to avoid violations of various Canons of the American Bar Association Code of Professional Responsibility ("ABA Code"). The district court, concluding that disqualification was not warranted, denied Cheng's motion. For the reasons set forth below, we reverse the district court's decision and remand for entry of an order of disqualification.

BACKGROUND

In 1977, Cheng, represented by Legal Services for the Elderly Poor ("LSEP"), instituted an employment discrimination action against GAF. From the start, GAF has been represented in this litigation by the law firm of Epstein, Becker, Borsody & Green ("Epstein firm"). In October, 1979, while the *Cheng* case was still in the dis-

covery phase, the Epstein firm hired Philip Gassel as an associate in its health law department. From 1974 until his association with the Epstein firm, Gassel had been employed as a senior attorney at LSEP. Although Cheng concedes that while Gassel was employed at LSEP he did not represent Cheng in any litigation, Cheng claims that Gassel did participate in discussions with other members of the staff about the GAF case.

After learning of Gassel's new association, Cheng filed a motion to disqualify the Epstein firm from representing GAF in the instant case. Cheng alleged that the "continued participation of the Epstein firm . . . seriously jeopardizes the integrity of confidences and secrets of [Cheng] which were imparted to Mr. Gassel under the cloak of attorney-client relationship." Weiss Affidavit at 5. Citing the small size of the LSEP legal staff, which consisted of four to six attorneys working with several part-time students, and noting the frequency of cooperation and consultation among the LSEP attorneys, Cheng claimed that Gassel had actual knowledge of Cheng's confidences and secrets when he joined the Epstein firm. Cheng argued, therefore, that under Canons Four, Five and Nine of the ABA Code,[1] the Epstein firm should be disqualified.

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[1] The ABA Code consists of Canons which are "axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers." While the Ethical Considerations accompanying each Canon are "aspirational in character," the Disciplinary Rules keyed to each Canon "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Preliminary Statement, American Bar Association Code of Professional Responsibility.

Canon 4 states: "A Lawyer Should Preserve the Confidences and Secrets of a Client." Canon 5 provides: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client" and Canon 9 warns that: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

Opposing the disqualification motion, the Epstein firm averred in its affidavits that Gassel had been hired as a health law attorney and had functioned only in that capacity, aside from handling some commercial litigation and miscellaneous matters. The Epstein firm emphasized that Gassel had not worked on the *Cheng* case, had not divulged any confidential information and would not be required to do so in the future. Gassel submitted an affidavit disclaiming any present involvement in the *Cheng* case and urging acceptance of the technique of insulation practiced by the Epstein firm.

In his opinion denying the disqualification motion, Judge Owen discussed Gassel's involvement in the *Cheng* case, and expressed the belief that Gassel possessed minimal confidential information, that he had not disclosed the information yet and that the Epstein firm had effectively screened him from the attorneys handling GAF's defense. Stating that the prejudice that would result from requiring GAF to change law firms after extensive discovery and trial preparation would be substantial, Judge Owen concluded that "to order disqualification under these circumstances would not serve any interest which the law recognizes." Because we disagree with Judge Owen's view of the effectiveness of the screening procedures employed by the Epstein firm, we reverse.[3]

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[3] After the filing of our decision in *Armstrong* v. *McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), the Epstein firm submitted a letter brief urging us to dismiss Cheng's appeal. In *Armstrong*, we held that "*henceforth* orders denying disqualification motions will not be appealable." 625 F.2d at 435 (emphasis added). We do not regard that language as precluding us from reaching the merits of the instant appeal.

Some of the considerations which prompted us to reach the merits in the *Armstrong* case counsel us to do so in the instant appeal. *See Armstrong*, 625 F.2d at 441–42. Since this appeal was filed,

Discussion

It is well settled in this Circuit that a motion to disqualify an attorney is addressed to the discretion of the district court, and a ruling thereon will not be overturned absent a determination of abuse of discretion. *Hull* v. *Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975). *See also Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977); *Allegaert* v. *Perot*, 565 F.2d 246 (2d Cir. 1977); *W. T. Grant Co.* v. *Haines*, 531 F.2d 671 (2d Cir. 1976). The question raised in this appeal is whether Judge Owen's refusal to disqualify the Epstein firm was such an abuse.

I. *Disqualification Under Canon 4*

The American Bar Association Code of Professional Responsibility has been recognized in this Circuit as providing appropriate guidelines for proper professional behavior. *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, *supra*, 567 F.2d at 227 n.2; *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128, 129 n.2 (2d Cir. 1976); *Cinema 5, Ltd.* v. *Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976); *Hull* v. *Celanese Corp.*, *supra*, 513 F.2d at 571 n.12 *Cf. Arm-*

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briefed, argued, and considered prior to the filing of the *Armstrong* decision, our disposition of the appeal on the merits will neither crowd the appellate docket nor delay the litigation below. On the other hand, for us to dismiss the appeal at this stage would entail a needless waste of both judicial and private resources. Cheng's appeal was filed in full compliance and proper reliance on the pre-*Armstrong* law of this Circuit. The evils the *Armstrong* decision is intended to avoid have already occurred in the instant case and cannot be undone by dismissal at this stage of the proceedings. Consequently, we can see no justification for wasting the time and resources of the parties, the trial court and this Court by requiring Cheng to re-appeal at a later date. Nor do we view *Armstrong* as intending such a result.

strong v. *McAlpin*, 625 F.2d 433, 446 n.26 (2d Cir. June 20, 1980) (although ABA committee that drafted Code has indicated rules were intended for use in disciplinary proceedings rather than in disqualification proceedings, Court refers to Code for guidance).

Canon 4 and its Ethical Considerations and Disciplinary Rules provide standards to guide an attorney in preserving the confidences and secrets of a client.[3] Cheng argues vigor-

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[3] *See* Canon 4, quoted in note 1, *supra*. The only Disciplinary Rule keyed to Canon 4 provides:

> DR 4-101 Preservation of Confidences and Secrets of a Client.
>
> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his em-

ously that under these standards Gassel should be disqualified from representing GAF in the present action. Although Gassel is not actively involved in GAF's defense, his disqualification under Canon 4 would implicate the sweeping prohibition of representation by a tainted attorney's co-workers contained in Canon 5. Disciplinary Rule 5-105(D) provides: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment." Although the district court below did not decide whether Gassel himself had to be disqualified under Canon 4, we must address this question briefly as it bears upon our analysis of Disciplinary Rule 5-105(D).

Determination of a violation of Canon 4 sufficient to disqualify an attorney traditionally has been based on a finding of concurrent or successive representation in the same or substantially related matters.

> [T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences

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ployees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

were disclosed to the attorney bearing on the subject matter of the representation.

T. C. Theatre Corp. v. *Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953). It is well established that a court may not inquire into the nature of the confidences alleged to have been revealed to the tainted attorney. To require proof of access to privileged information would "put the former client to the Hobson's choice of either having to disclose his privileged information in order to disqualify his former attorney or having to refrain from the disqualification motion altogether." *Government of India* v. *Cook Industries, Inc.*, 569 F.2d 737, 740 (2d Cir. 1978). *See also Funds of Funds, Ltd.* v. *Arthur Andersen & Co., supra*, 567 F.2d at 235-36; *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 354 (S.D.N.Y. 1955) (Kaufman, *J.*) ("complaint need only show *access* to such *substantially related* material and the inference that defendant received these confidences will follow.") (emphasis in original). In the instant case, there is no dispute that the matters involved in Gassel's former association with Cheng are substantially related to his present association: the suit and the parties have remained the same throughout the proceedings. The only changing factor has been Gassel, who has moved from the plaintiff's firm to the defendant's firm, thus becoming subject to a disqualification challenge.[4]

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[4] In our recent decision in *Armstrong, supra*, we noted that "with rare exceptions disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney's conflict of interests in violation of Canons 5 and 9 of the Code of Professional Responsibility undermines the court's confidence in the vigor of the attorney's representation of his client. . . . or more commonly (2) *where the attorney is at least potentially in a position to use privileged information concerning the other*

In *Silver Chrysler Plymouth Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975) (overruled on other grounds in *Armstrong* v. *McAlpin, supra*), we recognized that although there may be an inference that an attorney has knowledge of the confidences and secrets of his firm's clients, that inference is rebuttable. We also noted an earlier caution that the standard of proof to rebut this presumption should not become "unattainably high." *Id.* at 754, *quoting Laskey Bros. of W.Va., Inc.* v. *Warner Bros. Pictures*, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956). *See also Government of India* v. *Cook Industries, Inc., supra*, 569 F.2d at 741 (Mansfield, *J.*, concurring). After considering the affidavits submitted by all parties in the instant case, including Gassel, Judge Owen assumed for the purposes of the motion that Gassel had been privy to some confidential disclosures, but he admitted that the extent of Gassel's exposure to the *Cheng* case through informal discussions or general strategy conferences had not been conclusively determined. Thus, the district court refrained from deciding whether Gassel had rebutted the presumption that he had obtained impermissible knowledge of Cheng's confidences and secrets. If we accept Judge Owen's assumption that Gassel was privy to those confidences, however, it is clear that Gassel would have to be disqualified under Canon 4 from representing

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side through prior representation, for example, in violation of Canons 4 and 9, thus giving his present client an unfair advantage . . . ."

625 F.2d at 444, *quoting Board of Education* v. *Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979) (footnote and citations omitted) (emphasis added). In the instant case, because the Epstein firm is defending the still pending suit brought on Cheng's behalf by LSEP, Gassel is potentially in a position to use Cheng's confidential information to Cheng's disadvantage.

Cheng's adversary in the identical proceedings.[5] *Government of India* v. *Cook Industries, Inc., supra,* 569 F.2d 737; *Fund of Funds, Ltd.* v. *Arthur Andersen & Co., supra,* 567 F.2d at 225; *Emle Industries, Inc.* v. *Patentex, Inc.,* 478 F.2d 562 (2d Cir. 1973).

Applying Disciplinary Rule 5-105(D), it appears that the Epstein firm should be disqualified as well. Judge Owen did not reach this conclusion, choosing instead to find that regardless of the extent of Gassel's knowledge, Cheng was adequately protected because Gassel had not yet divulged any confidences and was not inclined to do so in the future. We have considered the affidavits submitted to the district court and we conclude that there is ample support for Judge Owen's assumption that Gassel had been privy to Cheng's confidences, thus we find that under Canon 4 he would be disqualified from representing the defendant in the *Cheng* case. We next address Canon 5 and the screening procedures instituted to avoid disqualification of the Epstein firm.

II. *The "Chinese Wall" Defense*

Anticipating difficulties caused by a strict application of Disciplinary Rule 5-105(D), law firms have employed

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[5] The following allegations appeared in the affidavits submitted on Cheng's behalf: Gassel was personally introduced to Cheng; he "was present at and participated in several discussions with other LSEP attorneys and law students regarding the conduct, strategy, and facts of Mr. Cheng's case"; he discussed Cheng's communications with the representing attorney. Weiss affidavit at 4. These allegations were not challenged or refuted in any of the Epstein firm's affidavits; indeed, they appear also in the Epstein firm's brief on appeal. GAF brief at 3. It appears from the stipulated record on appeal that no additional evidence was before Judge Owen. Because we find that the affidavits demonstrate that Gassel did have knowledge of Cheng's confidences and secrets, we accept Judge Owen's assumption for purposes of this appeal.

various methods of screening a possibly tainted attorney from the rest of the firm's involvement in a particular case. The Epstein firm in the instant case cites the division of duties within its firm to demonstrate the height and thickness of the "Chinese Wall" they have constructed between Gassel and the *Cheng* case. They note in their affidavits that Gassel has been assigned to the health law division of their firm while GAF's defense is being handled by its labor division. The affidavits also aver that Gassel has not worked on the *Cheng* case, disclosed Cheng's confidences nor discussed the merits of the case while at the Epstein firm, and that the firm will not permit him to have any substantive involvement in the *Cheng* defense. Judge Owen accepted the Epstein firm's position, finding that the "risk of disclosure of confidential information is negligible." We take a different view of the potential for disclosure, keeping in mind that, as Judge Owen noted, one of the purposes of disqualification is "to guard against the danger of inadvertent use of confidential information," *Silver Chrysler Plymouth Inc.* v. *Chrysler Motors Corp.*, *supra*, 518 F.2d at 754, *quoting Ceramco, Inc.* v. *Lee Pharmaceuticals*, 510 F.2d 268, 271 (2d Cir. 1975).

Although Gassel may not be personally involved in the *Cheng* defense, he is a member of a relatively small firm.[4] The matter involved in his prior exposure to Cheng while at LSEP is still being actively pursued by attorneys for GAF at the Epstein firm. Despite the Epstein firm's protestations, it is unclear to us how disclosures, admittedly inadvertent, can be prevented throughout the course of this

[4] The Epstein firm's affidavit states that a total of 35 attorneys are employed in their New York and Washington, D.C. offices, with approximately 60 percent of the total located in the New York office where Gassel is an associate. Becker affidavit at 1.

representation. Unlike many disqualification motions that appear before this Court, here there exists a continuing danger that Gassel may unintentionally transmit information he gained through his prior association with Cheng during his day-to-day contact with defense counsel. *Compare NCK Organization, Ltd.* v. *Bregman, supra*, 542 F.2d 128, and *Hull* v. *Celanese Corp., supra*, 513 F.2d 568. *See also Government of India* v. *Cook Industries, Inc., supra*, 569 F.2d 737. If after considering all of the precautions taken by the Epstein firm this Court still harbors doubts as to the sufficiency of these preventive measures, then we can hardly expect Cheng or members of the public to consider the attempted quarantine to be impenetrable. Although we do not question Mr. Gassel's integrity or his sincere efforts to disassociate himself from the *Cheng* case, we are not satisfied that under the facts of this case the screening will be effective, thus we look to Disciplinary Rule 5-105(D) and order the district court to disqualify the Epstein firm.[7]

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[7] Although the Epstein firm urges that the result in this case should be controlled by our recent decision in *Armstrong, supra*, we find many factors distinguishing the two situations. In *Armstrong*, a former government attorney was concededly disqualified from private employment in a matter in which he had had substantial responsibility while employed by the Securities and Exchange Commission. This Court held that the attorney's law firm could continue representation where the tainted attorney was screened effectively.

In the instant case the tainted attorney is disqualified under Canon 4's commendable intent to protect a client's confidences and secrets, while in *Armstrong*, the attorney was disqualified under Disciplinary Rule 9-101(B), which forbids a lawyer to accept private employment in a matter in which he had substantial responsibility while a public employee. In *Armstrong* we noted the absence of a threat of taint of the underlying trial, and cited several policy reasons for approving the screening employed there. Primary among these reasons was a recognition that to disallow screening in all cases involving government attorneys might ham-

See Cinema 5, Ltd. v. *Cinerama, Inc.*, *supra*, 528 F.2d at 1387, and cases cited therein. *See also Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, *supra*, 567 F.2d at 229 n.10.

III. *Appearance of Impropriety*

Although we rest our holding on the clear direction in Disciplinary Rule 5-105(D), the result is compelled also by Canon 9's warning that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." In *Armstrong* v. *McAlpin*, *supra*, 625 F.2d 433, we cited the restrained approach to disqualification that had been adopted in *Board of Education* v. *Nyquist*, *supra*, 590 F.2d 1241, noting that where there is no danger that the underlying trial will be tainted, appearances of impropriety alone are insufficient to justify disqualification. Judge Owen, in his opinion below, also cited *Nyquist's* recommendation of restraint and concluded that it was "virtually assured" that the underlying trial in *Cheng* would not be tainted. We disagree. Such assurances would not seem to be possible in a situation such as this where Gassel is "potentially in

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per the "government's efforts to hire qualified attorneys." 625 F.2d at 443. In the instant case, by contrast, there *does* exist a threat of taint of the underlying trial, but there are no public policy reasons against disqualification as compelling as those involved in *Armstrong*. In addition, the tainted attorney's former employer in *Armstrong* agreed to the representation as long as proper screening techniques were used; here, Cheng and LSEP, Gassel's former employer, have objected to the representation since the Epstein firm hired Gassel. Finally, although the prejudice to the client separated from his attorney is also a factor, we must note that the prejudice to GAF caused by changing firms at this point is much less than the hardship that would have resulted from disqualification in *Armstrong*. "[S]eparating the receiver from his counsel at this late date will seriously delay and impede, and perhaps altogether thwart his attempt to obtain redress for defendants' alleged frauds." *Id.* at 445.

a position to use privileged information," *Nyquist*, 590 F.2d at 1246, which he gained through his prior contact with the *Cheng* case. It is possible that, despite attempts by the Epstein firm to screen Gassel, the underlying trial could be tainted through GAF's inadvertent use of the unfair advantage it has over Cheng. This case presents, therefore, both the danger of tainting the underlying trial and the unacceptable appearance of impropriety condemned in Canon 9. *Cf. Emle Industries, Inc.* v. *Patentex, Inc., supra*, 478 F.2d at 565 (where public confidence in Bar would be undermined, "even an appearance of impropriety requires prompt remedial action by the court.").

Thus, it is clear that under Canon 9 as well as Canons 4 and 5, Gassel and the Epstein firm must be disqualified. Judge Owen's decision to the contrary was an abuse of discretion. Moreover, if there were any doubt as to the propriety of our action, we would resolve it in favor of disqualification. *Hull* v. *Celanese Corp., supra*, 513 F.2d at 571; *accord, Silver Chrysler Plymouth Inc.* v. *Chrysler Motors Corp., supra*, 518 F.2d at 757.

The order of the district court is reversed and the case is remanded for entry of an order of disqualification.

APPENDIX B

Opinion of the
United States Court of Appeals
Second Circuit

James K.J. Cheng,
Plaintiff-Appellant,

v.

GAF Corporation,
Defendant-Appellee.

Argued April 13, 1983.
Decided June 23, 1983.

Jonathan A. Weiss, Legal Services for the Elderly, New York City, for plaintiff-appellant.

Robert L. Jauvtis, New York City (Epstein, Becker, Borsody & Green, New York City, of counsel), for defendant-appellee.

Before FEINBERG, Chief Judge,
TIMBERS and MESKILL, Circuit Judges.

FEINBERG, Chief Judge:

James K.J. Cheng appeals from a decision of the United States District Court for the Southern District of New York, 566 F. Supp. 350, Richard Owen, J., awarding appellee attorneys' fees and expenses for the costs of

defending against appellant's allegedly "unreasonable and vexatious" attempts to disqualify appellee's counsel. For the reasons stated below, we reverse the decision of the district court.

I. Procedural History

An understanding of the unusual procedural history of this case is important both with respect to the threshold issue of appealability, and with respect to the merits of the appeal. Accordingly, we detail that history below at some length.

In 1977, appellant Cheng filed an employment discrimination suit against appellee GAF Corp. (GAF). Appellant was represented by Legal Services for the Elderly Poor (LSEP), and appellee was represented by the law firm of Epstein, Becker, Borsody & Green, P.C. (the Epstein firm). In 1979, an LSEP lawyer named Philip Gassel left LSEP and joined the Epstein firm. Cheng then moved to

disqualify the Epstein firm from further representing GAF in this case, alleging that Gassel had been privy to confidential information regarding Cheng's suit. The district court denied the motion, but in August 1980, this court reversed on the basis of the Canons of the American Bar Association Code of Professional Responsibility, finding that there existed a danger of taint and at least the appearance of impropriety. Cheng v. GAF Corp., 631 F.2d 1052 (2d Cir. 1980). In February 1981, the Supreme Court vacated this judgment and remanded, 450 U.S. 903, 101 S.Ct. 1338, 67 L.Ed.2d 327 (1981), citing the intervening case of Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981), which held that denials of motions to disqualify may not be reviewed on appeal until after trial except in special circumstances warranting a writ of mandamus. Before the remand reached this court,

appellant moved to have this court consider his appeal nunc pro tunc as a request for mandamus; this motion was summarily denied.

In May 1981, appellant moved again for a disqualification order in the district court. When the district court denied this motion, plaintiff sought a writ of mandamus from this court. This petition was denied in September 1981, and plaintiff's subsequent petition for a writ of certiorari was also denied.

GAF then moved in the district court pursuant to 28 U.S.C. Section 1927* for an award of attorneys' fees and costs incurred in

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* 28 U.S.C. Section 1927 provides as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

his original disqualification motion. The district court stated that it was "not prepared to fault plaintiff" for again seeking to disqualify the Epstein firm in the district court. Nonetheless, the district court found that "the subsequent mandamus [to the circuit court]...and the subsequent application for a writ of certiorari to the Supreme Court from its denial were frivolous in the extreme and 'unreasonably and vexatiously' multiplied the costs to defendant in this case with no genuine chance of success." Thus, the district judge assessed $1,000 in attorneys' fees, costs and expenses against appellant's lawyer, not for a motion before the district court, but for the petitions filed in the appellate courts.

II. Jurisdiction

[1] As an initial matter, appellee GAF asserts that this court lacks jurisdiction to hear

this appeal. We disagree. It has long been established that a small class of orders that do not terminate the underlying litigation are appealable as collateral orders despite the finality requirement of 28 U.S.C. Section 1291, which provides that "[t]he courts of appeals ... shall have jurisdiction of appeals from all final decision of the district courts ... except where direct review may be had in the Supreme Court." See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949). To be immediately appealable, an order must meet three criteria: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978). In other

contexts, this court has held attorneys' fee awards to be appealable collateral orders. As we stated in Seigal v. Merrick, 619 F.2d 160, 164 n. 7 (2d Cir. 1980):

> An award of attorney's fees does not fall within the ambit of Rule 54(b) certification, which is directed toward determinations of the parties' claims. See Swanson v. American Consumer Industries, Inc., 517 F.2d 555, 560-61(7 Cir. 1975). However, we have appellate jurisdiction under the collateral order doctrine. Cohen v. Industrial Loan Corp., 337 U.S. 541, 690 S.Ct. 1221, 93 L.Ed. 1528 (1949); Lowe v. Pate Stevedoring Co., 595 F.2d 256, 257 (5 Cir. 1979). Indeed, an early case permitting appeal from an order awarding fees before conclusion of the underlying litigation was a precursor of the Cohen collateral order doctrine. See Trustees v. Greenough, 105 U.S. 527, 531, 26 L.Ed. 1157 (1882).

[2] The order of attorneys' fees in this case is clearly a conclusive determination. The award was based on unsuccessful appeals to this court and to the Supreme Court. Since those appeals have been rejected, there can be no new grounds for any modification of the

award in the district court; appellant's lawyer has paid the $1,000 and can only look to appellate review for relief. Indeed, the district judge apparently recognized this when he declared that the award was final and appealable.* Thus, this case is quite unlike the situation in Hastings v. Maine-Engwell Central School District, 636 F.2d 893 (2d Cir. 1982), in which an interim award of attorneys' fees was assessed against a party, and was found to be not immediately appealable

* In an order filed December 1, 1982, the district court stated that the fee award "is final and certified for an interlocutory appeal." Appellee contends that this order did not satisfy the requirements for certification of an interlocutory order for immdiate appeal, pursuant to 28 U.S.C. Section 1292(b). We need not decide this question, hoever, since as appellee also notes, appellant did not apply to this court for permission to take an appeal within ten days of the district court's order, as required by Section 1292(b). Thus, appellant must rely on 29 U.S.C. Section 1291 as the jurisdictional basis for its appeal.

in part because it was subject to adjustment by the district court in its final award.

It is also clear that the fee award is completely separate from the merits of the case. As the Supreme Court stated in White v. New Hampshire Department of Employment Security, 455 U.S. 445, 451, 102 S.Ct. 1162, 1166, 71 L.Ed.2d 325 (1982), "a request for attorney's fees under Section 1988 raises legal issues collateral to the main cause of action...." The Court was speaking in the context of a post-judgment award of attorneys' fees to a prevailing party in a civil rights action, but it went on to add more generally that "fee questions are not inherently or necessarily subsumed by a decision on the merits." Id. n. 13; see Goodman v. Heublein, Inc., 682 F.2d 44, 47-48 (2d Cir. 1982) (fee questions separate from merits); Hastings v. Maine-Endwell Central School District, supra, 676 F.2d at 896 (same); cf. Swanson v.

American Consumer Industries, 517 F.2d 555, 560 (7th Cir. 1975) (award of attorneys' fees may be collateral and appealable before termination of the main case); Cinerama, Inc. v. Sweet Music, S.A., 483 F.2d 66, 70 n. 2 (2d Cir. 1973). The fee award here, which was for allegedly dilatory litigation tactics, has no connection with the merits of the underlying age discrimination suit.

Appellee GAF appears to concede that the order in this case satisfies the first two criteria of appealability set out above. GAF contends, however, that the award is effectively reviewable after final judgment and therefore not currently appealable. Quoting from Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik, 658 F.2d 944, 947 (3d Cir. 1981), GAF contends that after final judgment "the parties to the order will still be before the court, and retain the same interest in challenging the order as they have

today." Eastern Maico involved several fee awards pursuant to Fed. R. Civ. P. 37, including an award against an attorney pursuant to Rule 37(a)(4). The Third Circuit refused to permit an immediate appeal, on the theory that to do so would undermine the purpose of Rule 37, which is designed, among other things, to prevent delays in discovery. But the Eastern Maico court noted that penalizing an attorney for dilatory conduct may place him in a quandary, since a lawyer may be penalized for "filing a motion which a lawyer believes necessary to protect his client's interest." Id. at 949.

We think the sanctions in this case placed Cheng's lawyer in a simiilar quandary. He was penalized for filing a motion he believed to be in his client's interest, a belief quite understandably strengthened by this court's prior decision in this case reversing the refusal of the district court to

disqualify the Epstein firm. If appellant's lawyer is forced to await final judgment before obtaining appellate review of an award that may be personally burdensome, his position may become even more difficult. If the fee issue is linked to settlement negotiations, appellant's lawyer may be placed in an ethical dilemma; his view of any settlement proposal would almost certainly be colored by its handling of the attorneys' fee issue.

Although 28 U.S.C. Section 1927, like Rule 37, is intended to prevent unnecessary delay in litigation, see H.R. Conf. Rep. No. 1234, 96th Cong., 2d Sess. 8, reprinted in 1980 U.S. Code Cong. & Ad. News 2782, we think the problems posed by postponing review outweigh the possibility of delay raised by an immediate appeal. In this case, appellant's appeal of the fee award apparently has not delayed the underlying litigation; according

to appellant, discovery has proceeded independently of the appeal. Moreover, we think the fee award in this case is distinguishable from the Rule 37 situation involved in Eastern Maico. The fee award here bears no relation to anything that occurred in district court, since the sanction was imposed for appellant's efforts in appellate courts. The propriety of the award here will not be affected by subsequent developments in the case; it is thus unlike an award of fees for frivolous discovery motions, which "may not be completely separable from the merits of the underlying action." Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik, supra, 658 F.2d at 951. We note futher that after the decision in Eastern Maico, the Ninth Circuit has held sanctions against an attorney under Rule 37(a)(4) immediately appealable. See Reygo Pacific Corp. v. Johnston Pump Co., 680 F.2d

647 (9th Cir. 1982). Since this issue is not before us, we express no opinion on the appealability of sanctions under that section against the attorney rather than the party he represents.

An additional reason for permitting an immediate appeal in this case is the possibility that appellant's lawyer, as a non-party, may never receive any appellate review of the fee award if he is denied that opportunity now. If the case is settled, or if appellant succeeds on the merits, it is not clear that appellant's lawyer will be able to appeal. As the Ninth Circuit noted with respect to an assessment of expenses and attorneys' fees against an officer of a corporate party under Rule 37(b)(2):

> An order to pay attorney's fees and expenses under Rule 37(b)(2) is similar in both its purpose and effect to fines imposed for civil contempt which are made payable to an opponent to compensate the latter for loss sustained as a result of the contemnor's conduct.

> See Advisory Committee Note of 1970 to Amended Rule 37. As in the case of a civil contempt order, the non-party cannot argue the prorpriety of the Rule 37(b)(2) sanction for attorney's fees in an appeal from the final judgment as a party to the suit would be able to do. Unless he can obtain a review of the order and sanction at the time it is imposed a non-party will have no right of review at all.
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> David v. Hooker, Ltd., 560 F.2d 412, 417 (9th Cir. 1977).

We recognize that in Independent Investor Protective League v. Touche Ross & Co., 542 F.2d 156, 158 (2d Cir. 1976), this court in dictum suggested that a non-party attorney may in some circumstances be "so allied with a party as to preclude interlocutory review of an order to pay compensatory expenses." But there is no indication in this case that Cheng and his attorney are in collusion to create delay or are in any other way so closely tied that Cheng's lawyer should not be considered a bona fide third party for purposes of this appeal. Accordingly, we find persuasive the Ninth

Circuit's analogy to civil contempt proceedings against a non-party, which are generally immediately appealable. IBM v. United States, 493 F.2d 112, 115 n. 1 (2d Cir. 1973), cert. denied 416 U.S. 995, 94 S.Ct. 2490, 40 L.Ed.2d 774 (1974). We conclude that on the unusual facts of this case, the district court's order is appealable under the Cohen doctine. See Pomerantz v. Schandler, 704 F.2d 681, 682 (2d Cir. 1983).

III. The Fee Award

[3] The district court predicated its award of attorneys' fees on its finding that after the Supreme Court's decision in Firestone, supra, 449, U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571, appellant's attorneys should have known the efforts to obtain a mandamus "were without hope and would have the effect of unreasonably and vexatiously increasing costs to the defendant." The district court's decision seems to be based in

part on a misunderstanding of the procedural history of the case. The opinion below refers to Cheng's attempt to overturn the district court's July 1981 denial of Cheng's renewed motion to disqualify as "in fact the second mandamus to the Court of Appeals on the same record." Thus, the district court was unable to "understand why plaintiff should expect that the Court of Appeals, having denied mandamus on the way down from the Supreme Court should reverse itself on the way up again" (emphasis in original). Apparently, the district court mistook appellant's earlier motion before us, which was to convert his prior appeal to this court to a mandamus petition, for an actual mandamus petition. In fact, the motion to convert was denied, and the prior appeal was not considered as a mandamus. Thus, we do not find it surprising that appellant should thereafter seek mandamus from this court, in light of the Supreme

Court's suggestion in Firestone that mandamus may be appropriate under exceptional circumstances, 449 U.S. at 378 n. 13, 101 S.Ct. at 676 n. 13, and in light of this court's prior decision in appellant's favor.

Appellee GAF recognizes that under Firestone mandamus may be appropriate in rare cases to review an interlocutory order denying a motion to disqualify. Nonetheless, appellee argues that appellant's efforts to obtain a mandamus were frivolous because no new facts were presented, and because Cheng's mandamus petition "failed to allege any of the extraordinary circumstances which would authorize the issuance of the writ." In addition, appellee argues, Cheng failed to pursue any of the less drastic relief measures suggested in Firestone as alternatives to seeking an appeal, such as obtaining a protective order.

Appellant claims that new facts supported

his renewed efforts to disqualify the Epstein firm. Appellant refers to the disqualification of the Epstein firm in a similar case, Yaretsky v. Blum, 525 F. Supp. 24, 27 (S.D.N.Y.1981), and the citation of this court's prior decision on the merits with approval in other cases, see, e.g., Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 750 (2d Cir. 1 981). These "new facts" may lend some support to appellant's decision to press ahead with his disqulification efforts.

But more important, we think this court's prior decision on the merits was itself enough to justify appellant's efforts. The Supreme Court vacated that decision on procedural grounds, but it did not address this court's treatment of the merits. Thus, although the district judge was not bound by our previous decision, we find it puzzling that he chose to ignore the reasoning of that decision and again denied appellant's motion to

disqualify. More significantly, we find it extraordinary that he should penalize appellant's lawyer for attempting to have this court review that denial, given that this court had already ruled in appellant's favor in its earlier opinion. It might have been better if plaintiff had at least attempted to pursue one of the alternatives to mandamus listed in Firestone, supra, 449 U.S. at 378 N. 13, 101 S.Ct. at 676 n. 13; it might also have been better if plaintiff had detailed more clearly in his mandamus petition the circumstances he felt justified the extraordiinary remedy of mandamus. Nonetheless, while the petition for mandamus was ultimately denied, it was hardly unreasonable for appellant's lawyer to bring it. Indeed, in light of our earlier decision on the merits in Cheng's favor, his attorney may have been ethically obliged to pursue his

disqualification efforts.*

We are also surprised by the district judge's willingness to sanction appellant's attorney, not for a motion made in the district court, but for appeals taken to this court and the Supreme Court. A rule permitting a district court to sanction an attorney for appealing an adverse ruling might deter even a courageous lawyer from seeking the reversal of a district court decision.

We think such sanctions were particularly inappropriate in this case, in light of our prior opinion. Accordingly, after considering

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* Since we think appellant's appeal did not unreasonably multiply the proceedings in this case, we need not decide whether a fee award under 28 U.S.C. Section 1927 requires a finding of bad faith conduct, as appellant contends, or whether it merely requires a showing of unreasonable conduct, as appellee argues. In addition, we need not resolve appellant's claim that the district court was required to hold a hearing before awarding attorneys' fees, since we have decided in appellant's favor on other grounds.

all of the arguments of the parties, we reverse the decision of the district judge awarding $1,000 in attorneys' fees, expenses and costs to appellee, and remand to the district court for further proceedings consistent with this opinion.*

GAF contends that appellant's appeal of the fee award was frivolous because it clearly lacked a jurisdictional basis, and because appellant did not act on the district court's 28 U.S.C. Section 1292(b) certification. Thus, appellee seeks damages pursuant to Fed.R.App.P. 38, and 28 U.S.C. Section 1927. As indicated above, however, this court has jurisdiction to consider the appeal. Since the appeal is successful, it was plainly not

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* Appellant requests that the case be transferred to another district judge. We decline to transfer the case, however, as appellant has not specified an adequate basis for such a transfer.

frivolous; appellee's request for damages is denied.

TIMBERS, Circuit Judge, dissenting:

The surest way to undermine the longstanding final judgment rule--the cornerstone of federal appellate jurisdiction--is to sanction the corrosive erosion of particular exceptions. Here the majority, in its rush to reach the merits, has strained to create an exception which is not necessary and, in my view, is contrary to controlling law. I therefore respectfully dissent.

As the majority recognizes, there are three discrete requirements before the collateral order rule of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-47 (1949), may be invoked: (1) the order must conclusively determine the disputed question; (2) the order must resolve an important issue completely separate from the merits of the

action; and (3) the order must be effectively unreviewable on appeal from a final judgment. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). See Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981). Assuming arguendo that the first two requirements have been satisfied here, I am convinced that the third requirement has not been satisfied.

The Supreme Court through a number of decisions has clarified the circumstances under which appellate review of a collateral order is appropriate to ensure that a right will not "have been lost, probably irreparably." Cohen, supra, 337 U.S. at 546. For example, in United States v. Ryan, 402 U.S. 530 (1971), the Court held that a production order was not appealable where the respondent would have experienced a "substantial burden" in complying with a subpoena duces tecum. Id. at 532. Noting

that the respondent had the option of resisting the production order (and thus exposing himself to contempt), the Court emphasized that the test of whether a collateral order is appealable is not measured in terms of the difficulties it imposes on a party; rather, the inquiry must focus on whether "denial of immediate review would render impossible any review whatsoever of an individual's claims...." Id. at 533 (emphasis added). In United States v. MacDonald, 435 U.S. 850 (1878), the Court characterized the third requirement of Cohen as involving "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." Id. at 860 (footnote omitted). More recently, in Firestone the Court held that the "effectively unreviewable" requirement was not satisfied where the petitioner claimed that an order denying disqualification would be

effectively unreviewable on final appeal because of "the possibility that the course of the proceedings may be indelibly stamped or shaped with the fruits of a breach of confidence or by acts or omissions prompted by a divided loyalty...." Firestone, supra, 449 U.S. at 376. Observing that the petitioner had "fail[ed] to supply a single concrete example of the indelible stamp or taint of which it warns," id., the Court concluded that "our cases ... require much more before a ruling may be considered 'effectively unreviewable' absent immediate appeal." Id.

In light of the Supreme Court's unmistakable message to the lower federal courts as to the meaning of the "effectively unreviewable" requirement, I think it is mandatory for us to determine whether appellant in the instant case has presented compelling evidence that postponing review of

the Section 1927 fee award until the entry of final judgment in the underlying employment discrimination action will either "render impossible any review whatsoever," Ryan, supra, 402 U.S. at 533, or destroy the "legal and practical value" of appellant's right to challenge the district court's order on appeal. MacDonald, supra, 435 U.S. at 860.

Appellant presents three arguments in support of his claim that the order will be effectively unreviewable unless interlocutory review is allowed. First, he suggests that appellee might contend at the close of the underlying action that "the appeal was taken too late." Second, he suggests that the award will not be appealable if appellant prevails at trial. Third he suggests that the award will not be appealable if the parties settle.

Appellant's first argument may be disposed of quickly. Appellee has expressly

stated that it would not object to an appeal from the order allowing attorneys' fees after final judgment has been entered. Such statement forecloses appellee from contending to the contrary.

Appellant's second suggested scenario--the situation that would be presented if appellant should prevail on the merits in the underlying action--gives rise to a more substantial argument. Although appellant has done no more than rhetorically inquire whether he will be able to appeal from the fee order in the event that he prevails on the merits, in fairness the implications of this "possibility" should be explored.

Even if appellant prevails in the underlying action, it is clear that an appeal from the order granting the Section 1927 award will not be barred under the general rule that "the successful party below has no standing to appeal from the [district court's]

decree...." Public Service Commission v. Brashear Lines, 306 U.S. 204, 206 (1939); 9 Moore's Federal Practice para. 203.06, at 3-23 (2 ed. 1983). This is so for several reasons. First, the fact that a fee award is independent of the merits of the case, White v. New Hampshire Department of Employment Security, 455 U.S. 445, 451 n. 13 (1982), indicates that, even if appellant prevails on the merits, he still may lose on a motion for attorneys' fees.* This would provide him with

* The underlying action is an employment discrimination one brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Section 623 (1976 & Supp. II 1978). If appellant should prevail in the underlying action, he will be entitled to seek an award of reasonable attorneys' fees. Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 162-65 (7 Cir. 1981) (fees awarded in ADEA action pursuant to 42 U.S.C. Section 1988 (1976)); Frith v. Eastern Air Lines, Inc., 611 F.2d 950, 951 (4 Cir. 1979). But see Alford v. City of Lubbock, Texas, 484 F.Supp. 1001, 1008 (N.D.Tex. 1979), modified, 664 F.2d 1263 (5 Cir.), cert. denied, 456 U.S. 975 (1982).

the opportunity to bring up for review the interim Section 1927 fee award simultaneously with the appeal from the final order denying his fee application. Furthermore, Congress did not intend to place an attorney against whom sanctions have been imposed under Section 1927 in jeopardy of forfeiting his right to appeal from an adverse Section 1927 fee award. While Section 1927 does not "distinguish between winners and losers, or between plaintiffs and defendants," Roadway Express, Inc. v. Piper, 447 U.S. 752, 762 (1980),* in

* In 1980 Congress amended 28 U.S.C. Section 1927 (1976 & Supp. IV 1980) after the Supreme Court in Roadway Express held that, absent congressional action, the reference to "costs" in Section 927 could not be construed to include reasonable attorneys' fees. 447 U.S. at 757-63, 767. The 1980 amendment therefore added reasonable attorneys' fees to the list of sanctions that a judge may impose upon a dilatory attorney under Section 1927. H.R. Conf. Rep. No. 1234, 96th Cong., 2d Sess. 8, reprinted in 1980 U.S. Code Cong. & Ad. News 2782-83.

its focus on deterring dilatory tactics, permitting an attorney to appeal from an adverse Section 1927 order even though his client has prevaiiled in the underlying action is consistent with the intent of Congress that the sanctioned attorney be afforded "all appropriate protection of the due process available under the law." H.R. Con. Rep. No. 1234, supra note 2, at 2783.*

Moreover, if an attorney were required to take an interlocutory appeal in order to reserve his right to appeal from an order awarding fees against him under Section 1927 every time a court impose a Section 1927

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* Although the House Conference Report speaks of "afford[ing] the attorney all appropriate protections of due process available under the law" before the sanction is imposed, H.R.Conf. Rep. No. 1234, supra note 2, at 2783, clearly Congress intended that an attorney begiven an opportunity to challenge the propriety of a sanction imposed against him under Section 1927.

sanction, it is apparent that the purpose of Congress in reducing litigation delays by amending Section 1927 to include reasonable attorneys' fees would be undermined by the very statute which sought to reduce unwarranted delays.

Hence, although the possibility of appellant's prevailing on the merits may be of concern to his counsel that an appellate court might conclude that appellant or his counsel would be barred from pursuing an appeal merely because the client prevailed on the merits in the underlying action, this hardly rises to the level of rendering "impossible any review whatsoever," Ryan, supra, 402 U.S. at533, or destroying the "legal and practical value" of counsel's right to challenge the fee order on appeal. MacDonald, supra, 435 U.S. at 860. On the contrary, the overriding policy of the Supreme Court in avoiding "piecemeal litigation," Gillespie v. U.S. Steel Corp.,

379 U.S. 148, 152-53 (1964), mandates waiting until entry of final judgment before appealing from the Section 1927 fee award.

Finally, appellant suggests that the fee award may not be appealable in the event that the parties settle. The majority raises the spectre of an ethical dilemma for appellant's attorney. Speculating on the course of settlement negotiations, the majority conjectures that, if the fee issue is linked to settlement negotiations, appellant's attorney may be placed in an untenable ethical quandary. If speculate we must, the majority ignores an equally logical possibility, namely, that the parties might agree that the settlement does not determine the rights of either party with respect to an appeal from the Section 1927 fee award. Indeed, appellee has suggested that appellant could reserve the right to appeal from the fee award if a settlement is reached. In any event,

discussion of possible scenarios with respect to potential settlement of the case is reminiscent of the reference to the possibility of indelibly tainting the trial proceeding that the Supreme Court in Firestone found insufficient to render a collateral order denying disqualification "'effectively unreviewable' absent immediate appeal." 449 U.S. at 376.

I am mindful that in a pre-Firestone case we suggested that an interim fee award might be appealable under the Cohen doctrine. Seigal v. Merrick, 619 F.2d 160, 164 n. 7 (2 Cir. 1980). Seigal, however, arose in an unusual procedural context where the district court had dismissed the underlying complaint prior to our ruling on the appeal from the fee award. Id. at 164. On the other hand, in circumstances more analogous to the instant case, we have held that an appeal from a pre-judgment fee award

where counsel engaged in dilatory conduct is not appealable under the Cohen doctrine. Alart Associates v. Aptaker, 402 F.2d 779, 780-81 (2 Cir. 1968); see also Hastings v. Maine-Endwell Central School District, 676 F.2d 893, 896 (2 Cir. 1982) (interim fee determination does not satisfy finality and effectively unreviewable requirements). Morecver, while the distinguished author of our Seigal decision has pointed out the century-old precursor of the Cohen collateral order doctrine, Trustees v. Greenough, 105 U.S. 527, 531 (1882), recent Supreme Court developments suggest that we might be acting at our peril if we were to ignore the numerous Supreme Court decisions after Cohen referred to above. They clearly indicate that the effectively unreviewable requireent imposes a heavy burden on a party seeking review of an interlocutory collateral order. Clearly the Supreme Court, when using

language such as rendering any review "impossible" or "destroying" a party's right to appeal, did not contemplate that a court of appeals would find the collateral order doctrine apposite when the prospect of a party losing his right to appeal from a collateral order after entry of final judgment is mere speculation--and especially when it is more probable that no injury will occur if an appeal is postponed until after entry ofjudgment in the underlying action. Appellant here has failed to establish that any irreparable harm will occur if the appeal from the Section 1927 fee award is temporarily postponed.

Since appellant has failed to establish that the interim fee order is "effectively unreviewable," I would dismiss the appeal for lack of appellate jurisdiction. From the

majority's refusal to do so, I respectfully dissent.*

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* Since in my view we have no appellate jurisdiction, it is neither necesssary nor appropriate to reach the merits and I decline to do so.

APPENDIX C

Pertinent Excerpts of the Relevant Decision of the Court of Appeals for the Second Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
WILLIAM YARETSKY, et al.,

Plaintiffs,

- and -

MARY ROLEY, et al.,

Plaintiff-Intervenors, 76 Civ. 3360 (CBM)

- against -

BARBARA BLUM, et al.,

Defendants,

- and -

THE BRONX PROFESSIONAL STANDARDS REVIEW ORGANIZATION, INC. et al.,

Defendant-Intervenors.
----------x

A P P E A R A N C E S :

THE LEGAL AID SOCIETY
Civil Appeals & Law Reform Unit
11 Park Place - 8th Floor
New York, NY 10007
By: JOHN E. KIRKLIN, ESQ.

THE LEGAL AID SOCIETY
953 Southern Boulevard
Bronx, New York 10459
By: DAVID GOLDFARB, ESQ.

CHARLES ROBERTS, ESQ.
91 North Franklin Street
Hempstead, New York

Attorneys for Plaintiffs

EPSTEIN BECKER BORSODY & GREEN, P.C.
380 Madison Avenue
New York, NY 10017
By: JEFFREY BECKER, ESQ.

Attorneys for Defendant-Intervenors

CONSTANCE BAKER MOTLEY, D.J.

MEMORANDUM OPINION AND ORDER

Plaintiff has moved for disqualification of the law firm currently representing various organizations which have intervened in this action as defendants. For the reasons given below, the motion is granted.

Prior Proceedings and Factual Background

The facts relevant to this disqualification motion must be prefaced by a description of the somewhat involved procedural posture of this action. This case is a class action brought on behalf of all recipients of aid under New York State Plan for Medical Assistance To the Needy who are residents or patients of skilled nursing home facilities. Defendants are various state officials with responsibility for administering social services in New York State. The "intervenor-defendants" are four non-profit corporations established pursuant to the Social Security Act as professional standards review organizations (PSRO's), to monitor delivery of health care in long-term care nursing facilities. See U.S.C. §1320c-1 et seq.

On May 26, 1979, plaintiffs and defendants entered into a Stipulation of Consent to Partial Final Judgment (the Stipulation). On October 17, 1979, plaintiffs and defendants

entered into an Addendum Concerning Monitoring (the Addendum), which became part of the Stipulation. Together the Stipulation and the Addendum establish certain procedures governing the transfer of patients from a skilled nursing facility to a facility providing a lower standard of care. On that same day, October 17, 1979, this court ordered the entry of the Stipulation and Addendum as a partial final judgment.

On September 17, 1979, before entry of the Stipulation and Addendum as a partial final judgment, the four PSRO's who would subsequently become the intervenor-defendants entered into Memoranda of Understanding (MOU's) with defendants. These MOU's concerned review of long-term care, including care rendered in skilled nursing facilities. See 42 U.S.C. §1320c-20(a)(1). On March 25, 1980, plaintiffs moved this court for an order invalidating any MOU's

which did not contain procedures similar to those found in the Stipulation. Plaintiffs also sought to permanently enjoin defendants from entering into any future MOU's which did not contain the procedures set forth in the Stipulation and Addendum.

On April 16, 1980, the four PSRO's which entered into the disputed MOU's with defendants moved to intervene in this action. The motion to intervene was made as of right, and was unopposed. Plaintiffs then moved on May 1, 1980 for an order to declare the intervenor-defendants bound by the terms of the Stipulation and Addendum, as well as a permanent injunction prohibiting intervenor-defendants from entering into any future MOU's which did not contain the procedures found in the stipulation.

On June 9, 1980, this court filed a memorandum decision which: (1) declared the existing MOU's invalid, and (2) enjoined defe lants from entering into any further MOU's with intervenor-defendants without

requesting incorporation of the terms contained in the Stipulation. The June 9, 1980, memorandum decision also explained this court's refusal to enforce the terms of the Stipulation against the intervenor-defendants, essentially because the PSRO's had not been party to any of the proceedings which resulted in the entry of a Partial Final Judgment embodying the terms of the Stipulation and the Addendum.

Since their entry into this action, intervenor-defendants have been represented by the law firm of Epstein, Becker, Borsody & Green (EBB&G). In October, 1979, EBB&G hired Phillip Gassel as an associate. During the period from October, 1974, until shortly before his employment with EBB&G, Mr. Gassel was a staff attorney at Legal Services for the Elderly Poor (LSEP). LSEP has served as one of the primary sources of legal counsel for plaintiffs since the inception of this lawsuit,

although they ceased to represent plaintiffs after Mr. Gassel went to EBB&G. While at LSEP, Mr. Gassel was directly involved in a very substantial fashion with the preparation for, and litigation of, this suit on plaintiffs' behalf.

...

Use of Privileged Information

In order to determine whether EBB&G must be disqualified, this court must first determine whether Mr. Gassel himself is disqualified from representing defendant-intervenors. The appropriate test to be applied has come to be known in this Circuit as the "substantially related" test. The phrase comes from an opinion by Judge Weinfeld of this court in a case where a lawyer was attempting to represent a client with interests adverse to those of a former client. Judge Weinfeld stated that:

> the former client [must] show no more than that the matters embraced within the pending suit wherein his former attorney appears . . . are substantially related to the matters or cause of action where the attorney previously represented him, the former client. The court will assume that during the course of the former representation, confidences were disclosed . . . Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule . . . be maintained.

T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268-269 (S.D.N.Y. 1953). This test has been consistently endorsed by the Second Circuit, and specifically applied in cases involving alleged access to privileged information derived from prior representation. See Fund of Funds, Ltd. v. Arthur Anderson & Co., 567 F.2d 225, 235 (2d Cir. 1977) (and case cited therein); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973).

Preliminarily, defendant-intervenors suggest that this test is inapplicable because the privileged information allegedly possessed by Mr. Gassel, according to affidavits in support of this motion, was all derived from discussions with other lawyers from LSEP, rather than members of the plaintiff class. There is no support for this proposition, and the court rejects it. No satisfactory explanation is offered for why the considerations of Canon 4 should not apply with equal force to both information concerning legal theories and confidential information derived from direct contact with clients. Plaintiffs assert that Mr. Gassel was privy to all stages of development of this litigation. Defendant-intervenors now suggest that this type of information is somehow not "confidential" for purposes of Canon 4 because it was not derived from direct contact between Mr. Gassel and members of the plaintiff class. This

attempt to narrowly construe Canon 4 contravenes the spirit of the entire Code, and the dearth of support for such a position is easily understood.

Defendant-intervenors then assume, arguendo, the applicability of the "substantial relationship" test, but attempt to characterize it as a "rebuttable presumption." Intervenor-PSRO's Memorandum In Opposition to Plaintiff's Motion to Disqualify Counsel at page 20. According to defendant-intervenors, where "a matter [is] involved in the former and present representation" a rebuttable presumption arises that the attorney in question has received confidential information. The defendant-intervenors then seek to "rebut" this presumption by again pointing to the supposed distinction between information

about legal theories and negotiating positions in contrast to confidential information received directly from a client. They argue that since a significant amount of litigation and negotiation has already taken place, any advantage which might have resulted from Mr. Gassel's knowledge has already evaporated in the continuing contacts between the parties. This argument is both legally incorrect and factually unpersuasive.

First, the characterization of the "substantial relationship" test as a rebuttable presumption in incorrect. The presumption that confidential information has been received is not rebuttable. The whole point of Judge Weinfeld's formulation, subsequently adopted by the Second Circuit, is that "the former client" need "show no more than" a substantial relationship between the matters involved in the former and present actions. Once this relationship is shown, "[t]he Court will

assume that during the course of the former representation confidences were disclosed." Fund of Funds, Ltd. v. Arthur Andersen & Co., supra, 567 F.2d at 235 (quoting T.C. Theatre Corp. v. Warner Bros. Pictures, supra, 113 F. Supp. at 268-69). (emphasis added). Here Mr. Gassel has switched sides in the same lawsuit. The matters on plaintiffs' side of this lawsuit are clearly substantially related to the matters on defendants' side of this lawsuit.

Even if defendant-intervenors' interpretation of the "substantial relationship" test were correct, their attempts to rebut the presumption they have created are not persuasive on the instant facts. In a supporting affidavit, one of plaintiffs' counsel gives a detailed description of the types of information in Mr. Gassel's possession. See Affidavit of John E. Kirklin at ¶¶ 5 and 6. For instance, plaintiffs make the uncontested assertion that

Mr. Gassel was "primarily responsible for developing the expert statistical testimony on which plaintiffs intended to rely at trial." Id. Moreover, Mr. Gassel is credited with intimate knowledge concerning plaintiffs' future litigation strategy and plaintiffs' understanding of the consent judgment. Defendant-intervenors' position requires this court to accept that an opposing party's interpretation of a disputed court order is not confidential information when the parties are even now negotiating over how the disputed court order is to be applied. Defendant-intervenor position is factually unsupportable.

However, Mr. Gassel's assumed possession of confidential information, and his resulting personal disqualification do not end the court's inquiry. The question then becomes whether Mr. Gassel's disqualification requires the disqualification of the firm with which he is associated, EBB&G. As previously mentioned,

the Second Circuit has regularly referred to the American Bar Association Code of Professional Responsibility (Code) for standards to apply in dealing with disqualification motions. The Code speaks unequivocally about the situation now facing this court in Disciplinary Rule 5-105(D):

> If a lawyer is required to decline employment or withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment."

Since Mr. Gassel himself is clearly disqualified from representing the defendant-intervenors, application of Disciplinary Rule 5-105(D) is obvious here.

However, defendant-intervenors have properly argued against a mechanical application of DR 5-105(D). They point to a number of situations in which the American Bar Association has decided against disqualification of an

entire law firm simply because a single associate or partner has been disqualified. See, e.g., ABA Formal Opinion 342, 62 ABA Journal 517 (1976), ABA Opinion No. 889, 31 The Record 552 (1976). These decisions are based upon screening procedures designed to insulate the disqualified individual from any contact with the particular matter at issue while it is being handled by other members of the firm. In this case, EBB&G has given the court a detailed description of the efforts now being made to screen Mr. Gassel from any contact with this case. These efforts include isolating him from conversations and communications involving this matter, as well as locking up all files generated by the case. At this point the court feels it is appropriate to state that plaintiffs have not even suggested any deliberate attempt or propensity on Mr. Gassel's part to deliberately communicate confidential information. Accordingly, prevention of such an occurrence plays no part in this decision.

Nevertheless, despite Mr. Gassel's unimpeached good character and the screening efforts undertaken by EBB&G, the court finds that on the particular facts of this case EBB&G must be disqualified. As the Second Circuit has stated, disqualification of counsel is prompted by the "need to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information." Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975). In the instant case, the law firm involved has less than thirty lawyers in its New York office. Moreover, Mr. Gassel is employed in the firm's health law section, which is also the section of the firm charged with handling this case. In other words, the relatively small group of professional colleagues with whom Mr. Gassel interacts on a daily basis are also the group of people who must screen their activities

from Mr. Gassel, and who must, in turn, be screened from Mr. Gassel's disclosure, however inadvertent, of confidential information obtained by him during his tenure as an LSEP attorney. This court is very skeptical about the efficacy of any screening procedures given this situation. The court notes that its skepticism is shared by at least one panel of judges in the Second Circuit in the context of a law firm substantially larger than EBB&G. See Fund of Funds, Ltd. v. Arthur Anderson & Co., 567 F.2d 225, 229 n.10 (2d Cir. 1977).

In addition, the very extent to which Mr. Gassel was involved in this case on the other side while at LSEP makes nis screening virtually impossible at this stage. For instance, a dispute broke out between plaintiffs and defendants concerning certain conversations which were alleged to have taken place between the parties. At the request of plaintiffs' counsel, Mr. Gassel prepared an

affidavit about a conversation he had with defendants' counsel while he was employed at LSEP. Mr. Gassel prepared the affidavit with EBB&G's permission. In the same vein, it is certainly not impossible that Mr. Gassel could be called as a witness should this matter result in further litigation. Each of these situations has, or would, force contact between Mr. Gassel and EBB&G lawyers in the context of discussing this case. Surely no "Chinese Wall" could survive such an assault.

The Appearance of Impropriety

As this court reads the applicable law of the Second Circuit, the appearance of impropriety in violation of Canon 9 would not, standing alone be sufficient to require disqualification. See Board of Education v. Nyquist, supra, 590 F.2d 1241. Clearly this position is motivated by solicitude for a party's right to choose his own counsel, and an appreciation of the dislocation caused by disqualifying counsel

once an action has begun. However, these considerations must be balanced with "the need to maintain the highest standards of the profession." Government of India v. Cook Industries, Inc., 569 F.2d 737 (2d Cir. 1978). These standards take on practical importance in preserving the public's confidence in the legal profession. See Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 565 (2d Cir. 1973). This court would be hard pressed to explain to a lay person how it was in fact proper for a lawyer who was substantially involved with the prosecution of a lawsuit to switch sides in the middle of the action. The appearance of impropriety is incontrovertible on the instant facts, and serves as an important additional reason for disqualification of EBB&G.

...

No. 84-1192 (3)

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GAF CORPORATION,

Petitioner,

vs.

JAMES K. J. CHENG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

RONALD MICHAEL GREEN
ROBERT LLOYD JAUVTIS
250 Park Avenue
New York, New York 10177
(212) 370-9800

Attorneys for Petitioner

Of Counsel:
EPSTEIN BECKER BORSODY
& GREEN, P.C.
250 Park Avenue
New York, New York 10177
(212) 370-9800

March, 1985

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PETITIONER'S REPLY MEMORANDUM

Petitioner GAF will not belabor the merits of the opinion of the Court of Appeals for the Second Circuit, as Respondent Cheng has done almost exclusively in his Brief in Opposition. Suffice it to say that Cheng cites no authority for the proposition that this Court should not be reviewing a Circuit Court's analysis of a District Court's exercise of discretion.

Cheng opines that he knows of no other reported attorney disqualification cases involving legal services attorneys moving

into private practice. Whether or not that is a fact, the significant point is that the mobility of such attorneys must be substantially chilled and curtailed by the rationale applied by the Second Circuit. The issue of "screening" has been addressed by a variety of lower courts and ought to be considered by this Court to ensure uniformity of decision in an area peculiarly affecting the careers of attorneys and the rights of litigants to counsel of their choice.

For all the above reasons, a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

RONALD MICHAEL GREEN
ROBERT LLOYD JAUVTIS
250 Park Avenue
New York, New York 10177
(212) 370-9800

Attorneys for Petitioner

Of Counsel:
EPSTEIN BECKER BORSODY
& GREEN, P.C.
250 Park Avenue
New York, New York 10177
(212) 370-9800

March, 1985